

yourLAW

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DAVIDSON LAW FIRM, LTD.

Attorneys and Counselors at Law
724 Garland Street
Little Rock, Arkansas 72201
(501) 374-9977 • Fax (501) 374-5917
e-mail: DavidsonLawFirm@Arkansas.net

Selling Your Home: Do You Need a Real Estate Agent?

The news headlines might lead you to believe that no one is buying or selling real estate these days. However, people are buying real estate, particularly in light of the federal homeowner tax credit and lower home prices. For these folks, a question may arise: Should I work with or without a real estate agent? Although in some circumstances, selling your home without an agent can save you money, it is important to understand all of the advantages and disadvantages to this approach.

Experienced, reputable agents can provide valuable assistance to sellers. They can suggest the listing price, estimate how long it will take to sell the property, offer suggestions about how best to show the home, and determine whether buyers who inquire about the property are in a position, financially and otherwise, to buy the property. One of the most important reasons

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Reading the Fine Print

You have been setting aside some money each month and watching the weekly sale fliers, and you have finally made the big purchase: your dream 62-inch LCD television. It has been delivered and set up, but when you turn it on: nothing! You paid little attention to any warranties or return policies—but the store will get you a television that works, right? Although the law may not regulate the store's return policy, assuming it has one, the legal system has a lot to say when it comes to whether you will be protected by a warranty.

Warranties vary. Some are voluntarily made by the provider of goods or services while others are imposed by law. Some warranties deal with the quality of goods, while others deal with ownership. A federal law, the Magnuson-Moss Warranty Act

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There are a couple of ways you can get collectors to stop contacting you.



Debt Collection: What's Legal? What's Not?

If you are currently dealing with more debt than you can comfortably handle, take the situation very seriously. If you don't pay your debts on time, creditors are likely to report your delinquencies to one or more credit bureaus, thus harming your credit record. Creditors may also file a lawsuit against you seeking a judgment (i.e., a determination by a court that you owe a certain amount) or seeking permission to "attach" (that is, seize) property you own (such as bank accounts or wages). Your creditor may also seek to contact you directly and ask you to pay. Although being contacted by your creditors or their debt collectors can be frightening, you can use the law to protect yourself.

Federal and state laws place restrictions on what debt collectors can say to you and when and how they can contact you. Under the federal Fair Debt Collection Practices Act (FDCPA), a debt collector is someone, other than a creditor or its employees, who regularly collects consumer debts on behalf of creditors. This federal law does not cover creditors per se (unless the creditor uses a false name in attempting to collect the debt), but your state laws may govern them. Thus, retailers who attempt to collect unpaid debts would not be regulated by the FDCPA, but they may be covered by your state's law.

A debt collector may contact you by mail, in person, or by telephone or telegram, but he or she is not allowed to contact you at times the debt collector knows are inconvenient for you, unless you agree (or a court specifically grants permission). Unless a debt collector has information to the contrary, he or she must assume that times before 8:00 A.M. or after 9:00 P.M. are not convenient. Also, a debt collector is not permitted to contact you at work if he or she knows or has reason to know that your employer forbids employees from being contacted by collectors at the workplace. You can tell the debt collector what times and places are inconvenient for you to receive calls.

Under the FDCPA, there are a couple of ways you can get collectors to stop contacting you all together. A debt collector is forbidden from contacting you if he or she knows that a lawyer represents you in connection with the debt. You can also

stop a debt collector from contacting you by notifying the collector in writing. After that, attempts at contacting you must stop. There are, of course, exceptions to this, for example, the debt collector may contact you to tell you that there will be no more contact or that some specific legal action will be taken. However, debt collectors may state this only if they actually plan to take such action.

Debt collectors must also stop trying to contact you if you notify them, by mail, within 30 days after they send you notice, that you dispute all or part of the debt or that you are requesting the name and address of the original creditor. Debt collectors are permitted to begin collection activities again if they are able to verify the debt by sending you proof of the debt, such as a copy of the bill, or the information you requested about the original creditor.

A debt collector may contact any person to locate you. However, in doing so, the collector usually may not talk to anyone more than once or refer to the debt. If debt collectors use the mail to contact you or another person, they may not send letters in envelopes identifying themselves as bill collectors.

Prohibited Techniques

A debt collector may not harass, oppress, or abuse you. For example, a debt collector may not use threats of violence to harm you, your property, or your reputation; use obscene or profane language; or repeatedly use the telephone to annoy you. A debt collector further may not use false, deceptive, or misleading statements when trying to collect a debt. For example, a debt collector may not misrepresent the amount of the debt or falsely imply that the debt collector is a lawyer. A debt collector also may not use unfair means to collect a debt. In this context, "unfair" means collecting interest or any fee, charge, or expense unless that amount is authorized by agreement or law.

If Debt Collectors Break the Law

There are several steps you can take if you think a debt collector is breaking the law. If a creditor is making the collection effort, check the law with the consumer protection office of your state or your state attorney general's office and write that office a letter detailing your complaint (with a copy to the offending creditor). If the collection effort is being undertaken by an independent debt collector, you may want to contact the Federal Trade Commission (FTC) at www.ftc.gov. The FTC has been active in pursuing FDCPA violators and may occasionally fine them heavily or even put them out of business.

In addition, if debt collectors violate the FDCPA, you may sue them in a state or federal court. However, you may do so only within one year from the date they violated the law. If you believe that you have been the victim of unfair debt collection harassment, you should consider consulting your attorney. ■

The Best Situation for Your Child

If you are a divorced parent, you may have first-hand experience with how trying it can be to negotiate a child custody order. Even after you have an agreement in place, you may be faced with a stark reality: life doesn't stand still. Have you gotten a new job out of state? Has your former spouse remarried? Lost a job? What do these life changes mean to your child's custody? Well, don't worry too much; the legal system has established a method to address life changes and their impacts on custody orders.

Legally, child custody is the right and duty to care for a minor child on a day-to-day basis and to make major decisions about the child. In sole custody arrangements, one parent takes care of the child most of the time and makes major decisions about the child. In joint custody arrangements, both parents share in making major decisions, and both also might spend

substantial amounts of time with the child. Different states may use different terms (e.g., timeshare, possession, or conservatorship) to refer to custody. Some states refer to time spent with children as "physical custody" and to decision-making authority as "legal custody." A court need not award physical custody and legal custody the same way. For example, a court might award physical custody to one parent (with the other receiving visitation rights) but decide that decision-making authority (i.e., legal custody) is to be shared jointly by both parents.

If the parents cannot agree on a custody arrangement for their child, the court decides custody according to the best interest of the child. Determining the best interest of the child involves consideration of many factors, which may include the health and sex of the child, the primary caregiver prior to the divorce, parenting skills and willingness to care for the child, the emotional ties between child and parent, willingness to facilitate visitation by the other parent, and each parent's moral fitness.

Like most things in the world, child custody orders aren't set in stone

A court can change child custody arrangements to meet the changing needs of the child and to respond to changes in the parents' lives. Because courts favor stability for children and do not want to encourage contentious litigation, a parent seeking to change a custody arrangement must show two things. First, that conditions have changed substantially, and usually unpredictably, since the last custody order. The parent must also show that changing the custody arrangement would be better for the child. If, for example, a move out of state to follow a better job for a parent would require the child to attend a school that is far below the quality of that child's current school and would make regular visitation with the other parent nearly impossible, a court may determine this to be a change that would not be better for the child. Of course, such a decision would likely factor in many other concerns as well. Some courts may even require the parent to show that *not* changing the custody arrangements would be harmful to the child.

If you are in such a situation, you should talk to your attorney to determine the correct steps to take and your chances of success with each. Like most things in the world, child custody orders certainly aren't set in stone, so if your current custody order no longer seems right for your child, it makes sense to see what can be done to improve it. ✎

Reading the Fine Print continued from page 1

(the Act), covers written warranties for consumer goods costing more than a few dollars. Under the Act, merchants are not required to offer written warranties, but if they do, they must meet certain standards.

A warranty must be available for you to read before you buy. It must be written in plain language and include a number of pieces of information such as

- the name and address of the company making the warranty,
- the product or parts covered,
- whether the warranty promises replacement, repair, or refund,
- any expenses (such as shipping or labor) you would have to pay in connection with any of the above, and
- how long the warranty lasts.

Many states have warranty laws that provide consumers with greater protection than the Magnuson-Moss federal warranty law. For example, your state law may mandate a

minimum warranty length or prescribe certain steps for you to take to enforce your rights. Your attorney can help you identify the specific laws in your state.

In order to make warranties work to your greatest advantage, consider all warranty terms when you shop. The terms of a warranty are seldom negotiable—especially the warranty length, the types of problems the warranty covers, and what you must do to exercise your rights. But some elements, such as the price of an "extended warranty," may be negotiable. Also remember that the dealer selling you the merchandise is not the only source of service contracts—you can always search online or elsewhere for a better deal.

When comparing warranty terms, it is important to understand some frequently used terms. A *full warranty* is a promise that the product will be repaired or replaced free during the warranty period. Many stores will offer a short full warranty of their own (thirty to ninety days), and some premium credit cards will double a warranty for up to a year for products purchased with that card. *Limited warranties* are more common. They are less comprehensive and may cover parts but not labor.

You should also be aware of the distinction between express and implied warranties. *Express warranties* are promises to back up the product or promises about the product that the warrantor expresses either in writing or orally. For example, suppose your friend bought your car from you, and you said, "I guarantee you'll get another 10,000 miles out of this transmission." That's an express warranty. It isn't an opinion about quality or value, such as "This car is the best yellow used car for sale in town." Rather, it's a promise or specific statement of fact.

Warrantors do not actually state *implied warranties*—instead, they're automatically implied by the law in certain kinds of transactions. There are two main types of implied warranties: the implied warranty of merchantability and the implied warranty of fitness for a particular purpose.

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Real estate agents may be skilled at avoiding “deal breakers” and can help you find solutions to larger disagreements.



to use an agent is to have your property listed on a Multiple Listing Service, or MLS. The MLS makes detailed information about your property available to hundreds of other agents and buyers, usually online.

The advantage of selling without an agent is that you will not have to pay a sales commission, which, depending on the sale price, can be a very substantial sum. Typically, real estate firms charge a percentage (generally from 5 to 7 percent) of the sale price.

However, you also will have to assume all the responsibilities and associated costs of selling your home. These include advertising, spending time with potential buyers, making required disclosures, and negotiating. There are various books that can help guide you through the process, and experts generally recommend that you hire both an appraiser and a lawyer.

Making disclosures is an important part of

selling your home, particularly if you aren't using an agent. Disclosure obligations are generally addressed by state law, and requirements vary. Because this is an area of the law that is rapidly changing, it is important to review your state's requirements before even listing your home. You may want to disclose known material defects that seriously affect your home's value, even if your state does not mandate such disclosure. Responding honestly to the buyer's questions and either repairing material defects or disclosing them will help avoid future legal problems. Many lawsuits that involve real estate transactions are based on the seller's misrepresentation or failure to disclose.

There are at least three more distinct disadvantages to working without an agent. First, you will not have the resources that real estate agents have to attract buyers. Second, you will have to find the time to show your home and talk to potential buyers. (This could also raise some security issues.) And lastly, you will be directly involved in negotiating the sales price and other contract provisions.

At first glance, selling without a broker may seem easy. However, a professional real estate agent may be skilled at avoiding “deal breakers”—the kind of petty disagreements that can break up negotiations—and can help you find solutions to larger disagreements. If you have decided to sell on your own, remember that settling on the terms and conditions of sale, including the price, is a give-and-take process. For example, the fact that you love your renovated kitchen will not influence a potential buyer who intends to remodel anyway.

Regardless of which approach you take when selling your home, make sure that you go in with your eyes wide open. While many sellers find an attorney's guidance indispensable even when they are working with an agent, obtaining legal advice (both before signing a contract and at closing) is especially prudent when you are working without a realtor. **M**

Buying from the Owner

Buying a home that is for sale by owner, or FSBO, has one major advantage: the purchase price should be lower because the seller will not be paying a commission on the sale. However, the truth is that many FSBOs are initially priced as high as they would be if they were listed with a real estate firm. If you are interested in a FSBO, check the prices of comparable homes on the market as well as recent sales in the area to see if you will have room to negotiate a lower price.

The implied warranty of merchantability requires that a product be adequate for the purpose for which it is purchased (or leased). This general rule of fairness means, for example, that there is an implied warranty that a carton of milk in the supermarket dairy case is drinkable milk, and not sour or otherwise unusable. Generally, this warranty only applies to merchants who are in the business of selling or leasing a specific kind of product. Let's look at our television example. If your purpose is fairly ordinary—i.e., you want the television to display your shows—then the implied warranty of merchantability is what assures you that the television should work.

The implied warranty of fitness for a particular purpose, on the other hand, means that any seller or lessor is presumed to guarantee that an item will be fit for the buyer's particular purpose if the seller has reason to know that the buyer is relying on the seller to supply a suitable item. For example, if your friend tells you she needs a car that could tow a trailer full of granite up steep mountains, and if you sell her your car as a suitable vehicle for performing this task, then your friend has relied on your skill and judgment about the car. When you sell her the car knowing that she intends to use it for a specific purpose, you make an implied warranty that the car will in fact be able to accomplish that purpose.

There are a number of things you can do to protect your warranty rights. In order to protect your warranty rights, make sure you

- Keep your receipts throughout the warranty period. This will provide proof of when the warranty starts and ends.
- Remember that any violation of the manufacturer's operating and service instructions probably will void the warranty.
- First try to work things out with the store where you got the item when the problem arises.
- Contact the manufacturer in writing, at the address specified in the warranty.
- Keep a list of all communications. This correspondence file will protect your warranty rights near the end of the coverage period.

Of course, if your careful records and written correspondence don't seem to be helping and you are concerned that your warranty rights are being violated, don't hesitate to contact your attorney. **M**